UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

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| JOHN DOE,<br><br>Plaintiff,<br><br>v.<br><br>AMHERST COLLEGE, CAROLYN MARTIN, JAMES LARIMORE, TORIN MOORE, SUSAN MITTON SHANNON, and LAURIE FRANKL,<br><br>Defendants. | Civil Action No. 3:15-cv-30097 |

**PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS**

## i. Introduction

Plaintiff, John Doe ("Plaintiff" or "Doe"), the first-born son of Asian-American immigrants, was a member of the Amherst College ("Amherst" or "the College") Class of 2014. In the fall of 2013, a classmate, Sandra Jones ("Jones"), accused him of having sexually assaulted her one evening almost two years before, in the course of an interaction in which she performed oral sex on him while he was intoxicated to the point of incapacitation.[1] The accusation came during a period of relentless recriminations and national publicity over Amherst's failure to protect female students from sexual assault by male students and of intense pressure on the College to demonstrate its willingness to prosecute male sexual assailants. Jones's claim was that she had been a willing partner, but during the sexual activity, she changed

[1] Plaintiff moved for leave to file his complaint publicly under a pseudonym, which motion the Court allowed. Plaintiff also uses a pseudonym, Sandra Jones, to refer to the complainant in his disciplinary proceeding. Other students at Amherst College are identified using initials to protect their privacy.

her mind and withdrew her consent. Inside of six weeks, Doe was tried, found guilty, expelled, and stood branded as a sexual predator before the entire College campus.

After the hearing was over, Doe came into possession of text communications that Jones had sent the night of the encounter — documents which indisputably shattered the credibility of her account. A perfect storm of missteps had combined to prevent the evidence from being presented to the disciplinary tribunal, including an incompetent investigation by the College investigator, misguided advice by the College-appointed advisor, and, most of all, concealment by Jones. But when Doe sought relief from Amherst officials, they refused even to consider the evidence for the sole reason that he had not discovered it before expiration of a seven day appeal period.

This lawsuit ensued, which asserts multiple claims under state and federal law and seeks both damages and injunctive relief. Defendants have moved for judgment on the pleadings under Fed. R. Civ. P. 12(c), which, for reasons set forth below, must be denied. Doe was denied the protections promised to him in Amherst's *Student Handbook*; he was denied the legal protection of "basic fairness"; and he was denied equal treatment by Amherst based on his sex. Doe is entitled to relief that will enable him to complete the education he was promised, salvage his reputation, and reverse the devastating damage done to his life.

## ii. Statement of Facts

On October 28, 2013, when John Doe had almost completed the fall semester of his senior year at Amherst, he was charged by Sandra Jones, a classmate, with having committed sexual assault by forcing her to have oral sex on an evening in February 2012, when they were both sophomores. On that night, Jones nearly carried an inebriated Doe to the room she shared with EK, her roommate and Doe's girlfriend who was away, for a sexual interaction. Doe was

drunk to the point of incapacitation, as he recalled absolutely nothing of the interaction with Jones the following day or at any point afterwards. Complaint ("Compl.") at ¶27.

Jones filed no charge for a year and half — not until Amherst had become the center of nationwide outrage over its failure to protect female students from sexual assault. The Complaint recites the events that led up to and continued during Doe's disciplinary proceeding. In summary, there was a climate of

> unprecedented and intense pressure upon Amherst College to take action and produce results concerning sexual assaults by male students against female students on campus. Amherst had been accused of mistreating sexual assault victims, not protecting students, and doing nothing to identify and punish perpetrators of sexual misconduct on its campus.

Compl. at ¶15. Jones's complaint against Doe appeared just as Amherst found itself in the midst a firestorm of controversy in which the College was relentlessly criticized by students, activist groups, and local and national media outlets. *Id.* at ¶¶15-26.

In response to Jones's belated complaint that Doe had, 20 months earlier, compelled Jones to submit to oral sex without her consent, Amherst put the case on a fast track with a hearing promptly scheduled to take place before the winter break. Compl. at ¶¶28-29. An attorney, Allyson Kurker ("Kurker"), was appointed by Amherst to investigate. *Id.* at ¶30. By the time Kurker interviewed Jones, the story had changed. Now Jones admitted that she had engaged in oral sex willingly but claimed that she had changed her mind in the middle of the act and withdrew her consent, yet Doe did not quit. *Id.* at ¶32. To the investigator, Jones denied having ever recorded what happened with Doe in email, text message or any other writing. *Id.* at ¶33. Kurker limited her investigation to interviewing witnesses identified by the two adverse parties, all of which she accomplished (except for one witness) on a single day. *Id.* at ¶31. Although Kurker was provided information that Jones had exchanged text messages with another

student (DR) after the episode with Doe, and that Jones had then "hooked up with another guy," she did not follow up on either of these points. *Id.* at ¶¶36, 38.

In the meantime, Doe was completely unprepared to defend himself in the upcoming hearing. Compl. at ¶¶42-44. He was isolated and emotionally overwhelmed. He was not allowed to have legal counsel attend the hearing. He was assigned an "advisor," an Assistant Dean, who was prohibited from acting as an advocate. *Id.* at ¶¶29, 42. Doe did not know how to investigate on his own; he did not even know that he could or should investigate; in fact, he was advised that he was not even allowed to speak to anyone about the allegations against him unless he obtained prior authorization from Kurker. *Id.* at ¶¶29, 44. When Doe asked if he should seek to get evidence from the "other guy" who had "hooked up" with Jones later the same evening, he was advised by defendants Torin Moore, his advisor ("Moore"), and/or Susie Mitton Shannon, the assistant Title IX coordinator ("Mitton Shannon"), that this evidence was inadmissible and should not be pursued. *Id.* at ¶45.

The hearing took place on December 12, 2013, just six weeks after Jones filed her complaint.[2] Compl. at ¶47. At the hearing, Jones testified consistent with her second version of reported events — namely, that she was first a willing participant in the sex, but that she withdrew her consent but Doe forced her to continue.[3] *Id.* at ¶53. She claimed that she had been traumatized and had asked a friend to come over "to talk to [her] and spend the night." *Id.* at ¶54.

[2] It is worth noting that Jones chose to file her complaint a time convenient for her—contending she did not file it in the spring of 2013 because she wanted to focus on the end of that academic year. Thus, she had nearly six months in advance of the disciplinary proceeding to prepare for what would take place. Doe was given no such consideration.

[3] The version related to the investigator is the second version known to Doe; however, Doe has no information about what Jones told Mitton Shannon in her earlier report in Spring 2013. Information about this earlier report might uncover even more inconsistencies.

Doe testified that he had experienced a blackout and had no memory of even being with Jones that evening. Compl. at ¶55. Nevertheless, despite his lack of memory, he said he would never have forced a woman to have sex. *Id.*

During the hearing Jones for the first time made reference to two text messages she had sent after Doe had left the room in February 2012: one asking a person to come over to comfort her, and the other to another friend, DR. Compl. at ¶56. But no one asked for the messages to be produced, and the *Student Handbook* procedures provided no means for Doe to obtain them. *Id.* at ¶¶56-57.

The Board reached its decision immediately after the hearing and released it the next day. Compl. at ¶58. It found Doe had violated the *Statement on Respect for Persons,* specifically the *Sexual Misconduct Policy: Sexual Assault."* It made the following specific findings:

> Your account of being "blacked out" is credible. However, as stated in the Student Handbook: "Being intoxicated or impaired by drugs or alcohol is never an excuse for sexual misconduct and does not excuse one from the responsibility to obtain consent" p. 32.
>
> Ms. Jones's account of withdrawing consent after it had initially been given – as evidenced by Ms. Jones saying "no" and "I don't want to keep going" and by her asking you to leave and pushing you away – is credible and supported by a preponderance of the evidence.

*Id.* at ¶58 & Ex. 4. Doe was required to vacate the campus immediately, being given less than an hour to pack his belongings. *Id.* at ¶60. His written appeal was denied on January 16. *Id.* at ¶62. This was followed by a campus-wide electronic notification stating that he had committed sexual assault, had been expelled, and was not allowed on campus. *Id.* Although the announcement did not identify him by name, it was widely known that he was the student referenced. *Id.*

After the appeal was denied, Doe retained counsel and sought to obtain evidence that had been unavailable at the hearing. In particular he identified the "other guy" as ML and then

obtained text messages and an affidavit from him establishing that Jones had invited ML over to have sex after Doe left, and was hardly "anxious, depressed, or otherwise in distress." Compl. at ¶¶63-65.

Doe also obtained a series of text exchanges between Jones and DR, an upperclassman Residential Counselor, which started at 1:14 am, just after Doe had left Jones's room. These were as follows:

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|---|---|
| Sandra Jones: | Ohmygod I jus did something so fuckig stupid |
| DR: | What did you do |
| Sandra Jones: | Fucked [John Doe]. … FUCK |
| DR: | No you didn't . … |
| Sandra Jones: | official story is he puked and I took care of him but yes. Yes I did. FUCK |
| DR: | [Sandra] what are you doing???????? |
| Sandra Jones: | Oh and apparently [ML]s coming over so nothing happened everything's fine … |

Compl. at ¶66. Jones went on to express her fear of the fallout when her roommate, EK, and others found out that she had had sex with EK's boyfriend, especially since, "I'm pretty sure [John Doe] was too drunk to make a good lie out of shit." *Id.* at ¶67. She said that if EK were to find out, "[S]he would literally never speak to me again." DR then suggested that Sandra Jones "put all the blame on [John Doe]." Sandra Jones responded that "[EK] knows me it's pretty obvi I wasn't an innocent bystander." They agreed that they both "hate[d]" John Doe. *Id.* at ¶67.

The text messages between Sandra Jones and DR continued even during Jones's simultaneous interactions with ML, who arrived during Jones's extended texted conversation with DR. In her messages to DR after ML arrived, Sandra Jones complained, "why is he just talking to me." She described how she was doing her best to seduce him: "Like, hot girl in a slutty dress. Make. Your. Move. YEAH." In the late morning of February 5, 2012, Sandra Jones sent the following text message: "Ohmygod action did not happen til 5 in the fucking morning." *Id.* at ¶68.

Doe's attorney presented these materials to the College on April 16, 2014, requesting that he be reinstated or that the matter be reopened. This was refused. *Id.* at ¶¶72-73.

## iii. Argument

### I. Standard of Review

The hurdle at the Rule 12(c) stage is at its lowest for a plaintiff.[4] In reviewing such a motion, the Court takes as true all well-pleaded facts of the complaint and makes all reasonable inferences in favor of the plaintiff. *Arruda v. Sears, Roebuck & Co.*, 310 F.3d 13, 18 (1st Cir. 2002). On a Rule 12(c) motion, "it is enough for a plaintiff to sketch a scenario which, if subsequently fleshed out by means of appropriate facts, could support an actionable claim." *Garrett v. Tandy Corp.*, 295 F.3d 94, 105 (1st Cir. 2002). The factual allegations at the outset of the case need only show that a plaintiff's claims rise above the "'speculative level'" — this is not a high bar. *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 8 (1st Cir. 2011) (reversing dismissal) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Of course, a Court reviewing a Rule 12(c) motion may not "attempt to forecast a plaintiff's likelihood of success on the merits" or "disregard properly pled factual allegations, even if it strikes a savvy

[4] The standard of review for a Rule 12(c) motion is the same as that applied for a Rule 12(b)(6) motion. *See Pérez-Acevedo v. Rivero-Cubano*, 520 F.3d 26 (1st Cir. 2008) ("A motion for judgment on the pleadings is treated much like a Rule 12(b)(6) motion to dismiss") (citation omitted).

judge that actual proof of those facts is improbable.'" *Id.* at 12 (internal quotation omitted); *see also Anderson News, LLC v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012) ("A court ruling on…a [Rule 12(b)(6)] motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible.") (cited in *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 720 F.3d 33, 45 (1st Cir. 2013) (vacating dismissal)).

The College argues that the Court owes some special deference to "internal decisions by private colleges." Def. Mem.[5] at p. 19. Of course, a court must be sensitive to an institution's right to make its own academic decisions and to order its relationship to and among students free from unwarranted government interference. Nonetheless, courts are not reluctant to grant relief against private universities where substantive rights are violated, despite concerns about academic freedom. *See Cannon v. Univ. of Chicago,* 441 U.S. 677, 705 (1979) (Title IX private right of action seeking admission to medical school); *Brown v. Trs. of Boston Univ.,* 891 F.2d 237 (1st Cir. 1989) (ordering university to grant lifetime tenure under Title VII). Moreover, Doe's disciplinary procedure did not involve allegations of academic wrongdoing or violation of some ordinary college rule. He stood accused of a serious crime and was made to face potentially disastrous and longstanding consequences as serious as those posed by criminal prosecution. In these circumstances, a court's inquiry into the sufficiency of the disciplinary process is necessarily "more searching." *See Doe v. Univ. of the South*, 4:09-cv-62, 2011 WL 1258104, at *13 (E.D. Tenn. Mar. 31, 2011).

[5] Plaintiff shall refer to the memorandum of law in support of Defendants' motion for judgment on the pleadings as "Def. Mem." herein.

## II. Doe Has Adequately Pled Breach of Contract (Count I).

The College does not dispute that Doe had a contractual relationship with it. Pursuant to that contract, Amherst owed Doe two sets of obligations.

*First*, Amherst was obliged to follow its own rules and procedures as set forth in the *Student Handbook*. These are to be interpreted according to "'the standard of reasonable expectation — what meaning the party making the manifestation, the university, should reasonably expect the other party to give it.' " *Schaer v. Brandeis Univ.*, 432 Mass. 474, 478 (2000). The touchstone, then, is what reasonable expectations are created in the reasonable student as he reviews the *Student Handbook*.

*Second*, Amherst was obliged to afford Doe a disciplinary process that complied with "notions of basic fairness," an obligation which stands separate and apart from an inquiry into whether the College complied with its specific contractual obligations under the *Student Handbook*. *See Schaer*, 432 Mass. at 481. This duty is implicit in every such contract and is conceded by Amherst. Def. Mem. at p. 32. Moreover, here, Amherst explicitly promised a "fair and impartial evaluation and resolution", *see* Compl., Ex. 1 (*Student Handbook*), Appendix B ("*Policy*") at I ¶1, p. 3,[6] including a "thorough, impartial and fair investigation." Compl., Ex. 1, Appendix C ("*Procedure*") at IX, ¶1, p. 21.

### A. Doe Has Adequately Alleged That The Disciplinary Proceeding Did Not Comport With Basic Fairness.

The components of a basically fair disciplinary process include a meaningful opportunity to be heard, "a principle basic to our society," *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S.

[6] As Amherst has done, Doe's page references shall refer to the ECF-imposed pagination on Exhibit 1, which contains Appendices B and C, excerpts from the College's *Student Handbook* for 2013-2014.

123, 168 (1951) (Frankfurter, J., concurring)), which in turn includes an equal opportunity to present and respond to evidence,[7] impartiality, and, above all, an effort to find the truth.

A court tasked with determining whether a disciplinary process was fair may look to evidentiary and procedural rules that apply to court proceedings to "measure[] the adequacy and fairness" of the process. *Cloud v. Trustees of Boston Univ.*, 720 F.2d 721, 725 (1st Cir. 1983). Although basic fairness has been described as "an elusive concept," its content is determined based on the "specific factual context." *Wisch v. Sanford Sch., Inc.*, 420 F. Supp. 1310, 1315 (D. Del. 1976). On the far end of the spectrum, conduct that is arbitrary or capricious is clearly unfair. *See*, *e.g.*, *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 244 (D. Vt. 1994) (describing disciplinary procedures as "designed to promote fairness and to protect students from arbitrary or capricious disciplinary action") (granting summary judgment to student where college failed to adequately inform student that he was charged with two violations of student code and ordering college to expunge student's record); *Morris v. Brandeis Univ.*, 60 Mass. App. Ct. 1119, at *2 (2004) (Rule 1:28 mem. and order) (analyzing basic fairness with reference to whether challenged conduct was arbitrary or capricious); *Ahlum v. Admin. of Tulane Ed. Fund*, 617 So.2d 96, 98-99 (La. App. Ct. 1993) (in addition to review for compliance with written procedures, evaluating whether disciplinary decision was arbitrary or capricious (citing *Coveney*, 388 Mass. 16 (1983) and others)). *See also Shoestring Ltd. P'ship v. Barnstable Conserv. Comm'n*, 20 Mass. L. Rptr. 279, at *3 (Mass. Super. Ct. June 6, 2005) (citing *T.D.J. Dev. Corp. v. Conserv. Comm'n of North Andover*, 36 Mass. App. Ct. 124, 128 (1994); *Cotter v. Chelsea*, 329 Mass. 314, 318 (1952)).

[7] Amherst concedes that basic fairness includes an "equal opportunity to call witnesses to testify at the disciplinary hearing, to present evidence, and to respond to the evidence." Def. Mem. at p. 33.

Here, Doe alleges a proceeding that failed to provide basic fairness in numerous respects. Jones's story, as ultimately told to the Hearing Board, was that she willingly began to perform oral sex on Doe, her roommate's boyfriend, but changed her mind mid-course. Compl. at ¶53. The Hearing Board credited that she had withdrawn her consent, and Doe's expulsion was based entirely on his failure to terminate the interaction at this point. *Id.* at ¶58. But, although undiscovered at the time due to various failures on the part of Defendants, there existed powerful evidence — in the complainant's own contemporaneous *written* words — that shattered the credibility of her account. That evidence clearly indicated that:

- Jones was the moving force throughout the *whole* episode. She described the encounter, in writing, in language that unmistakably conveyed her agency, as initiator and active participant in the sexual act. She "did something." Something that was "stupid." She "fucked" him. This language casts a whole new light on her account of the event itself, on the reason for her belated admission that the text existed, and on her characterization of its contents. [8]

- Jones, within minutes of having sex with Doe, invited ML to her room to "entertain" her and then, while he was there, gave a running and graphic account to DR, the Residential Counselor, of her seduction of him ("Like, hot girl in a slutty dress") as well as her impatience with his slowness in response. Contrary to her testimony at the hearing that she invited a friend to spend the night because she felt "alone and confused", the texts show that she began a flirtatious seduction of ML and continued, unabated, after Doe left. Indisputably, the communications disclosed that she was anything but terrified and traumatized by her encounter with Doe, as she testified.[9]

- Jones's sole distress was fear of what her roommate, Doe's girlfriend, would think. She discussed the possibility of covering up what really happened with DR, who suggested that she "blame" it on Doe. Her only objection to that strategy was that it would be obvious to EK who "knows" that she "wasn't an innocent bystander." In other words, she was motivated and willing to lie, but was concerned only that it would not work.[10]

[8] Compl. at ¶¶66-67, 70 ("'Ohmygod I jus[t] did something so fucki[n]g stupid…Fucked [Doe]…yes. Yes I did.'").
[9] Compl. at ¶64 ("Significantly, and contrary to her testimony that she invited her 'friend' because she felt 'alone and confused' the texts show that she had begun her efforts to get him over at 5:00 p.m. the evening before. Then, she redoubled her efforts immediately after Doe had left the room…").
[10] Compl. at ¶67 ("DR then suggested that Sandra Jones 'put all the blame on [John Doe].'").

- Jones was fully aware that Doe was impaired at the time ("too drunk to lie" about the episode, because he was too drunk to separate lie from truth).[11]

- Jones concealed her text messages, lied to the investigator and to the tribunal.

It is indisputable that this evidence was highly relevant and material; it was as exculpatory and pivotal as evidence could ever be. But, through a combination of failures, including concealment by the complainant, incompetent investigation, erroneous advice, haste, and, ultimately, just plain refusal, the evidence was never presented to the Hearing Board, never investigated and never even considered by anyone at Amherst College. These failures included that:

- There was no "thorough, impartial, and fair investigation" which, had it been done, would easily and inevitably have turned up the evidence. *See infra* at Argument, II(C)(1).

- Doe did not have anything approaching an equal ability to present or respond to the evidence. The complainant concealed her text messages and lied to the investigator about their existence. When their existence emerged at the hearing, Doe had no ability to obtain them, to evaluate them, or to call relevant witnesses to discuss them, and no Amherst official or Board member took any action to respond to revelation of the missing evidence.

- Doe was utterly untrained and unprepared to defend himself. He had no ability to investigate on his own and was limited by the College's requirement that the charge against him be kept confidential. This compelled him to rely on the College's investigation, which was wholly inadequate.

- Rushed into the hearing, under terrible stress, denied the ability to have an attorney present before the Board, he had to rely on the advice of an advisor supplied by Amherst who was not permitted to be an advocate, did not assist him to investigate, and misled him as to the admissibility of evidence, including the highly exculpatory testimony of ML. *See infra* at Argument, II(C)(2).

- The Board found that the complainant performed oral sex on Plaintiff during a period he experienced a "blackout", that is, he was unable to give consent under Amherst's own policy. *See Policy* at IV, ¶4, p. 9. If Jones's story were true, she was also culpable for sexual misconduct. Yet no one at Amherst ever considered

[11] Compl. at ¶67 ("Jones went on to express her fear of the fallout when her roommate, EK, and others found out that she had had sex with EK's boyfriend, especially since, 'I'm pretty sure [John Doe] was too drunk to make a good lie out of shit.'")

her responsibility. She was allowed to continue with her education and graduate, while Doe was expelled. This was unfair and discriminatory. *See supra* at

- Perhaps most damning of all, when senior officials of the College learned that this series of missteps had coalesced to suppress the pivotal exculpatory evidence in the case, they just turned a blind eye, refusing to give it any substantive consideration. Amherst's sole justification for this categorical rebuff is Doe's failure to produce the evidence within the seven day post-expulsion appeal period specifically provided by the *Procedure*, Def. Mem. at 31-32, even though he did not acquire the evidence until after that time had run, even though he had been induced to forego presentation of evidence from ML *by Moore and/or Mitton Shannon.* No interest in "finality" justifies the College's treatment of a disciplinary decision as invulnerable to reconsideration, no matter what the grounds and no matter what the consequences to the student, within a week of the decision, much less here where the complainant concealed it and Doe was induced to forego presenting it (at least from ML) by Moore and/or Mitton Shannon. The refusal to reopen the matter here represented the epitome of arbitrary, capricious and unfair behavior.[12]

What is most remarkable about Amherst's motion is that at no point in the filing does it make any effort to explain how a fact-finding process that overlooks evidence so thoroughly devastating of a complainant's account can be considered fair by any measure. This is the overriding issue in the case, which Amherst wholly fails to confront. Instead, its response is limited to a hypertechnical analysis of the precise black letter components of its written procedure, in an effort to show that each one was observed and that others were never granted in the first place. As set out below, even this analysis is flawed. At any rate, Amherst completely misses the point, which is that the procedures actually employed — some in accordance with the *Handbook* and some not — allowed no opportunity for the exculpatory evidence to emerge. To be sure, the law does not dictate a book of procedural rules for private institutions to follow. But when the very failure to apply them or provide for them leads to a breakdown in the reliability of the investigation and fact-finding process, the guarantee of basic fairness comes into play. By

[12] The College had an obligation to consider evidence which cut to the heart of whether Doe actually did anything wrong when it was presented in the circumstances of this case. Even if the College were otherwise entitled to rely on the concept of "finality" to ignore compelling evidence that Doe simply could not be found responsible for sexual assault, which it is not, it remains to be seen in discovery how consistently this concept has been applied.

focusing exclusively on the trees rather than the forest, Amherst's brief — just as its conduct of the disciplinary process itself — reveals a startling indifference to the goal of getting to the truth of what happened. Whether caused by negligence, ignorance, design, or the insufficiency of its procedural structure in the circumstances of the case, Doe has alleged a process that was not a search for the truth at all and was undeniably unfair.

**B. There was Insufficient Evidence to Find that Doe Committed "Sexual Assault".**

Amherst does not dispute that Doe was contractually entitled to complete his education unless he was properly found by the Hearing Board to have committed sexual assault, and accordingly, that the conclusion that he committed a sexual assault had to be supported by the evidence credited by the Board. Plaintiff claims that he could not have been validly found responsible where the Board found that he was "blacked out," which is defined in the *Student Handbook* as "incapacitated," in "a state beyond drunkenness or intoxication," lacking in "conscious awareness," and "unconscious, asleep or otherwise unaware that the sexual activity is occurring." *Policy* at IV, ¶4, p. 9. Amherst responds that this finding makes no difference because the *Policy* does not require proof of any state of mind or awareness at all to find a student responsible for sexual assault, since the "objective conduct of the complainant is dispositive." Def. Mem. at p. 21. This is said to be because the *Policy* does not refer explicitly to *mens rea* of any kind as an element of the offense of "sexual assault."

This argument is flawed, and bizarre. It would hardly be an objectively reasonable interpretation of Amherst's *Handbook* that a student can be found guilty of an offense that he was not consciously aware was happening. It is basic law, as well as common sense, that merely because a written prohibition of certain conduct does not explicitly set forth a required state of mind does not mean that there is none. Justice Jackson's opinion for the Court in *Morissette v.*

*United States,* 342 U.S. 246 (1952) is the seminal articulation of the role of *mens rea* in American law, recognizing that the requirements that there be "some mental element and punishment for a harmful act" and that "wrongdoing must be conscious to be criminal" are so deeply rooted in our culture and law, that when statutes are silent on the subject, "courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation." *Morissette*, 342 U.S. at 250-252. Thus, the Court held, in construing a statute punishing a familiar common law crime, (larceny in that case), it is presumed that the omission of "any express prescription of criminal intent" is merely a function of the lack of any need to spell out what is inherent. *Id.* at 261-262.

The issue here is: what would a reasonable Amherst student expect from its code? Naturally, one would legitimately expect that Amherst's *Sexual Misconduct Policy*, which seeks to punish what are otherwise criminal offenses, would incorporate the most fundamental principles of culpability in our law as to mental state, especially where the *Policy* elsewhere explicitly looks to Massachusetts criminal law for definition.[13] These foundational tenets include the following:

1. To be found guilty of a crime, one must have committed a *conscious, voluntary act. Model Penal Code,* §2.01.[14]

[13] "In the state of Massachusetts, consent can never be given by minors under the age of 16." *Policy*, at IV, ¶4, p. 8. This is found in M.G.L. 265, §23 (statutory rape).

[14] The Model Penal Code, §2.01 provides:

(1) A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.

(2) The following are not voluntary acts within the meaning of this Section:

(a) a reflex or convulsion;

(b) a bodily movement during unconsciousness or sleep;

(c) conduct during hypnosis or resulting from hypnotic suggestion;

(d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

2. In a sexual assault case, where a person is not found to have used force to overcome the victim's will, he may only be found responsible if it is shown that he knew or should have known that the victim either did not consent or was incapable of consenting. *See Com. v. Mountry*, 463 Mass. 80, 90-91 (2012); *Com. v. Blache*, 450 Mass. 583, 594-95 (2008).

Nothing in the *Policy* supports the view that these bedrock principles do not apply. Amherst relies upon the provision that states that "[b]eing intoxicated or impaired by drugs or alcohol is never an excuse for sexual misconduct and does not excuse on from the responsibility to obtain consent." *Policy* at IV, ¶4, p. 9. But it ignores the parallel provision that incapacitation is a "state beyond drunkenness or intoxication," a state which does relieve a person from responsibility for his or her own actions. *Id.* And, even if the "drunkenness is no excuse" clause could be interpreted to override the requirement that he must have had or been capable of having knowledge of the lack of consent,[15] it still, by its terms, requires voluntary conduct, *i.e.* more than merely sitting by while the act was performed upon him.[16]

Applying these bedrock principles to the findings of the Board, one must keep in mind the particular circumstances of the only type of sexual conduct at issue in this case: at all times it was Sandra Jones who was performing oral sex on the plaintiff:

- The Board found that Doe was guilty because he did not discontinue the sex once Jones had expressed her withdrawal of consent. It did not find that he physically forced her or overpowered her to compel her to perform the act – only that she had stated that she withdrew her consent and the act continued. Compl., Ex. 4.

[15] The two provisions are, actually, mutually exclusive. The *Handbook* provides that intoxication, or the less severe standard of impairment, *Policy* at IV, at ¶4, p. 4, is not an excuse to ***obtain*** consent, whereas incapacitation, more severe than either impairment or intoxication, means one lacks conscious awareness and is not even capable of consenting to engage in any sexual activity with anyone period, regardless of the mental state or will of the other party involved in the interaction.

[16] The Hearing Board clearly understood that it was important to determine whether Jones had expressed her lack of consent in a fashion that Doe did or could have understood, in that it asked Jones multiple times how she expressed her desire to discontinue giving oral sex to the Plaintiff. *See* Compl., Ex. 3 (Trans.) at 43:9-11; 50:6-9; 56:7-11.

- The Board did not find, however, that Doe perceived, or could have perceived, that Jones had withdrawn her consent.[17]

Of note here, the Hearing Board did *not* find that Doe compelled Jones to perform oral sex by force, merely that she expressed her lack of consent but then apparently continued to perform the act. Without a finding that Doe compelled her to continue, the findings in the Hearing Board's decision fully lend themselves to the conclusion that Doe could have understood Jones to have renewed her consent by continuing to perform the act even after expressing that she did not wish to continue. In short, the Board did not find either that (1) Doe knew or could have known that Jones did not consent, or even that (2) he had any conscious or voluntary agency in the sex act, which *Jones* performed *on him*. In this respect, the Board's finding of guilt is consistent with Amherst's interpretation of its code in its current motion, to wit, that guilt turns exclusively upon "the objective conduct of the complainant" regardless of the conduct of the respondent. But this interpretation is completely erroneous. On the actual findings made by the Board, Doe was entitled to be found not responsible and to continue his academic career.

### C. The College Failed To Abide By Its Own Procedures.

Having undertaken to represent what process Doe might expect in the event he stood accused of sexual misconduct in the *Student Handbook*, the College concedes it was obligated to abide by its own procedures. It failed to do so in numerous ways.

[17] Amherst goes to some lengths to quarrel with this finding, Def. Mem. at pp. 12-13, but it does not explain how it can rely on the Board's findings when justifying Doe's expulsion, but reject them when they do not support the decision. In any event, there was ample evidence to support the Board's finding on this point. A witness, RM testified at Doe's hearing that Doe "couldn't stand by himself . . . [He] looked like he didn't have any balance. [H]e didn't seem to be aware who he was talking to, he was with. I mean, I'm not even 100% sure he knew he was making out with [Jones]. . . . He didn't respond to anything anyone said to him. And []when they left together he couldn't make it down the stairs by - - himself. [Jones] had to support him and help him down." Compl., Ex. 3 (Trans.) at 113:20-114:8.

**1. Doe was Denied a Thorough, Impartial and Fair Investigation.**

Amherst promised in its handbook that Doe would receive a "thorough, impartial and fair investigation." *Procedure*, at IX, ¶1, p. 21. Yet, as the Complaint alleges this investigation did not meet this standard. The investigator failed to identify and interview the persons with whom Jones communicated immediately after the interaction with Doe — DR and ML — and failed to obtain the written communications Jones had at or about the time of the event. Had she taken these steps, she clearly would have uncovered the crucial exculpatory evidence. In fact, the investigator did little more than conduct interviews on a single day with persons who had been identified for her.

To this Amherst responds that the *Student Handbook* granted the investigator unreviewable and absolute discretion to choose what was potentially relevant and what she could ignore, and Doe therefore had no reasonable or enforceable expectation at all that she would seek out or collect exculpatory evidence. This proposition is said to be supported by the fact that the *Procedure* section of the *Student Handbook* only states that the investigator "***may*** *. . . interview* any other individual *he or she finds to be potentially relevant* to the allegations," Def. Mem. at p. 25, (italics in original) and only "*will* ***try*** to obtain evidence relevant to the investigation as the Investigator *determines,* ***in his or her judgment****, to be necessary*." *Id.* (emphasis in original). This is wholly flawed. In the first place, Amherst's *Sexual Misconduct Policy*, another section of the *Handbook* which likewise applies,[18] states that the "investigator ***will*** coordinate the gathering of information from the Complainant, the Respondent and any other individuals who may have information relevant to the determination." Compl., Ex. 1, *Policy*, at VIII, ¶4, pp. 17-18 (emphasis added). The *Policy* also says the "investigator ***will*** also ***gather any*** available physical

[18] The *Procedure* in Appendix C refers to and incorporates the *Policy* in Appendix B, including importantly the definitions. *Procedure* I, p. 18.

or medical evidence, including documents, communications between the parties and other electronic records as appropriate." *Polocy,* at VIII, ¶4, p. 18 (emphasis added). Importantly, both sections of the *Handbook*—the *Policy* and *Procedure* for ease of reference—provide for a "thorough, impartial, and fair investigation." *See Policy*, at VIII, ¶4, p. 18 ("The investigation will be thorough, impartial and fair…."); *Procedure*, at IX, ¶1, p. 21 (requiring "a thorough, impartial and fair investigation"). No reasonable interpretation of these complimentary sections of the *Handbook* would suggest that the investigator had the discretion to exclude exculpatory information from her inquiry, or to fail to explore the existence of contemporaneous witnesses or communications which might bear upon the complainant's account. This is particularly so where, as here, the investigator must have understood that the entire proceeding, and Doe's fate, depended on Jones's credibility since Doe had no memory of their interaction and there were no other witnesses. Even where a professional is contractually charged with discretion in completing a task, this does not mean the professional is free to abrogate the most basic, minimal standards. Doctors and lawyers, among others, are sued all the time for failing to comply with the elementary standard of care for doing or failing to do things that are not specifically spelled out in the engagement.[19] *See, e.g., Palandjian v. Foster*, 446 Mass. 100 (2006) (suit against physician for breach of standard of care for failing to order tests which would have allowed for an earlier diagnosis); *Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, P.C.*, 25 Mass. App. Ct. 107 (1987) (suit by client alleging attorney breached standard of care by, *inter alia*, proceeding too slowly in initiating an action on client's behalf). Doe is similarly entitled to prove at trial that Amherst never provided a "thorough, impartial, and fair" investigation, according to the most elementary criteria.

[19] Plaintiff expects to offer expert testimony as to what a competent investigation by a qualified investigator would entail.

**2. Doe was Denied Competent Advice And Guidance.**

There is no dispute that the *Handbook* required the College to give Doe access to a "trained advis[er]", that is, an adviser trained and capable of assisting a respondent in understanding the College's procedures and guiding "the student through the pre-hearing and hearing process". *See Policy* at Art. II, ¶ 6, p. 19. Doe alleges that Moore was not properly trained, as demonstrated by virtue of the fact that Moore, either directly or after consulting Mitton Shannon, advised Doe that evidence from ML was inadmissible and could not be offered. The advice Doe received was simply wrong — the *Handbook* generally excludes evidence of "*prior* sexual history" by the complainant, but it does not speak to *subsequent* sexual activity. *See Policy*, at X, ¶3(b), p. 24.[20] Evidence from ML — whether just his observations of Jones or, also, the fact that he was invited for and engaged in sexual activity — was relevant to challenge the veracity of her claim she had been assaulted and was distraught. A reasonable factfinder could (and likely would) doubt Jones's account in the face of evidence that she was flirtatious with another student both before and after her interaction with Doe and voluntarily invited this other student to her room for sex after Doe left.

**III. Amherst Breached The Covenant of Good Faith and Fair Dealing (Count II).**

The covenant of good faith and fair dealing is intended to ensure that, whether or not expressly spelled out in the contract, one party cannot destroy the right of the other to the contract's benefits. *See Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451 (1991) (where defendant's conduct "destroyed or injured [plaintiff's] right to receive the fruits of the contract [it] violated the implied covenant"). The covenant cannot be relied upon to create contractual

[20] The "prior" is prior to the events at issue in the disciplinary process, as made clear by the similar use of "prior" in this same section: "Additionally, a prior finding (post appeal rights) of responsibility for a similar act of sexual misconduct will always be deemed relevant and may be considered in making a determination as to responsibility and/or assigning of a sanction." *Id.* Clearly the relevant "prior finding" would be a finding that pre-dates the incident being reviewed in the disciplinary proceeding at issue.

obligations but is only concerned with the manner of performance. *Ayash v. Dana-Farber Cancer Inst.*, 443 Mass. 367, 387-388 (2004).

Doe's relationship with Amherst is contractual in nature. Doe was entitled to remain enrolled and to work to earn his academic degree if he paid his tuition, met academic standards, and conducted himself in a manner consistent with the College's requirements. Doe was expelled based on a purported finding of sexual assault, but Doe identifies facts, circumstances and evidence which, if credited as on this motion they must be, demonstrate that in fact he did not commit sexual assault and that his expulsion was erroneous. Amherst cannot continue to deprive Doe of his ability to enroll and meet his degree requirements based on conduct which it should have discovered at the time, and as alleged certainly knows by now, he did not commit.

More specifically, Doe alleges facts which demonstrate that the disciplinary process was unfair and did not comport with Amherst's own written policies and procedures; this adequately alleges breach of the covenant. *See Ayash*, 443 Mass. at 387-388 (jury entitled to find covenant was breached where physician's termination was not in accord with applicable hospital procedures, but vacating judgment for plaintiff due to inadequate proof of causal damage); *Starr v. Fordham*, 420 Mass. 178, 184-185 (1995) (partners who had not treated the plaintiff fairly with respect to partnership profits violated the covenant). As just one example, Doe was offered an advisor, who was supposed to have adequate training to assist him in his proceeding, but in fact, Moore was incompetent and gave bad advice, including concerning the admissibility of evidence from ML. *See*, *e.g.*, *Larson v. Larson*, 37 Mass. App. Ct. 106, 110 (1994) (husband breached covenant when, after promising to pay a portion of his earnings to support his former wife, he quit his job). These allegations suffice to state a claim for breach of the covenant of good faith and fair dealing.

## IV. Doe Has Properly Pled A Title IX Claim Against The College (Count IV).[21]

Title IX[22] protects students from discrimination in educational institutions on the basis of their sex, including in university disciplinary proceedings. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994). To state a Title IX claim based on a student disciplinary proceeding, the student must demonstrate that the conduct of the university at issue (*e.g.* the discipline) was motivated by the university's gender bias. *University of the South*, 687 F. Supp. 2d at 756. Federal courts recognize that this may be accomplished under two theories: (1) a selective enforcement claim[23]; or (2) an erroneous outcome claim[24]. *Mallory v. Ohio Univ.*, 76 Fed. Appx. 634, 638 (6th Cir. 2003). Doe's allegations set out a Title IX claim under both theories.

### A. Doe's Selective Enforcement Claim

It is fundamental under the federal antidiscrimination law upon which Title IX was patterned that a plaintiff may meet his *prima facie* burden of proving discrimination by alleging that a similarly situated person outside of the protected class was treated differently. *Haley v. Virginia Com. Univ.*, 948 F. Supp. 573, 580 (E.D. Va. 1996) (Title IX was enacted to supplement the Civil Rights Act of 1964, thus courts have interpreted Title IX by looking to the case law developed under Titles VI and VII); *see generally*, *McDonald v. Santa Fe Trail Co.*, 427 U.S. 273, 281-84 (1976) (plaintiff met Title VII *prima facie* burden by alleging white and black employees committed same misconduct but employer only disciplined white employees). Doing

[21] Doe does not intend to pursue the Title IX claim against the individual defendants.

[22] Title IX states, in pertinent part, "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ..." 20 U.S.C. § 1681(a).

[23] Under the selective enforcement theory, a student may successfully plead a Title IX claim by alleging that the university's discipline of the student was affected by the student's gender as evidenced by the university treating a similarly situated student of the opposite gender more favorably. *Yusuf*, 35 F.3d at 715.

[24] Under the erroneous outcome theory, a student must demonstrate that the student was wrongly found to have committed an offense and disciplined at least in part because of the student's gender. *Yusuf*, 35 F.3d at 715.

so creates a presumption of illegal discrimination which then shifts the burden to the defendant to provide a non-discriminatory basis for their actions. *See Haley*, 948 F. Supp. at 580.

This burden-shifting scheme is also available to plaintiffs alleging Title IX discrimination and takes effect in what courts have termed "selective enforcement" claims. *Mallory*, 76 Fed. Appx. at 641. Under a Title IX selective enforcement claim, a student creates a presumption of illegal discrimination by demonstrating, for example, that the university treated the male student differently from a similarly situated female student. *See Haley*, 948 F. Supp. at 580; *Johnson v. Western State Col. Univ.*, 71 F. Supp. 3d 1217, 1224 (D. Colo. 2014). The female student's circumstances must be sufficiently similar, but not identical, to those of the male student. *Mallory*, 76 Fed. Appx. at 641 (requiring female comparator was "in circumstances sufficiently similar" to plaintiff); *Haley*, 948 F. Supp. at 580 (male student's burden was to identify female students accused of similar conduct). Under analogous federal discrimination cases,[25] it is clear that comparison cases "need not be perfect replicas." *Conward v. Cambridge Sch. Comm.*, 171 F. 3d 12, 20 (1st Cir. 1999) ("Exact correlation is neither likely nor necessary, but the cases must be fair congeners."). The First Circuit recognizes that "[r]easonableness is the touchstone" and the test is whether "a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated." *Conward*, 171 F.3d at 20.

As discussed above, the findings of the Hearing Board here were that Jones voluntarily engaged in sex with plaintiff – performing oral sex – while he was "blacked out," a state in which one "does not actually have conscious awareness or ability to consent." Under Amherst's *Policy,* having sex with an incapacitated person constitutes sexual misconduct. *Policy*, at IV, ¶3,

[25] Given the relative dearth of law concerning Title IX student discipline claims, and particularly selective enforcement claims, the parameters of what "sufficiently similar" are not well-defined. For guidance, Federal courts look to analogous federal disparate treatment law. *Yusuf*, 35 F. 3d at 714 ("[C]ourts have interpreted Title IX by looking to the body of law developed under Title VI, as well as the caselaw interpreting Title VII.")

p. 7, ¶4, p. 9. Jones was aware of Doe's impairment, as she expressed in her text messages that night, Compl. ¶67, and admitted it at the hearing. Compl., Ex. 3 (Trans.) at 43:2-6. Thus, *if* Jones were telling the entire truth, *she* was at least equally culpable to Doe. If anything, she was *more* culpable since he was incapacitated and she was not. Yet Amherst allowed her to go on to graduation, but expelled Doe, *for the identical conduct.* This is as clear a *prima facie* case for selective enforcement as there could be. [26]

To this, Amherst has only two responses, each of them frivolous. First, it argues that, as a matter of law, "a male respondent in a sexual misconduct proceeding is not similarly situated to a female complainant in the same proceeding," citing two cases, *Doe v. Case Western Reserve University*, 2015 WL 5522001, at *3-6 (N.D. Ohio 2015) and *Sterrett v. Cowan*, 85 F. Supp. 3d 916, 937 (E.D. Mich. 2015). The cases are nothing like this one. The claims rejected in those cases were nothing more than the plaintiffs' bare complaints that their female accusers had received more favorable treatment in the conduct of the disciplinary process against them. The essence of Doe's Title IX claim is not that Jones was treated better in the prosecution of *his* case, but that she was not prosecuted, investigated, or even considered for investigation or prosecution for *her* sexual misconduct. *Compare, Doe v. Univ. of Mass.-Amherst*, 2015 WL 4306521, at *9 n.6 (D. Mass. July 14, 2015) ("*UMass"*) (rejecting selective enforcement claim where comparison was to different conduct, i.e. non-sexual misconduct). Unlike the cases cited by Amherst, the comparison here is based not on the treatment in the disciplinary proceeding, but on

[26] *See McDonald*, 427 U.S. at 282-83 (Where employer decides theft "may render an employee unqualified for employment, this criterion must be applied alike to members of all races, and Title VII is violated if . . . it was not." (internal quotations omitted)). In *McDonald*, the United States Supreme Court found that the plaintiff had pled a *prima facie* Title VII claim by alleging that the employer had learned that white employees and black employees were stealing from the company but disciplined only the white employees. *Id.* Recognizing the "illogic in retaining guilty employees of one color while discharging those of another color," the Court stated that the employer would violate VII if it didn't discipline employees equally. *Id.*

the identity of the underlying sexual conduct — conduct that is so identical, indeed, that the acts were committed at the same time and in the same interaction.

Next, Amherst argues that the cases are, in fact, not identical since Doe never filed a complaint against Jones. This is similar nonsense. Doe has never sought to punish Jones. His claim is just that they were treated differently and that he was entitled to the same treatment that she received—not that she should get what happened to him. By comparison, consider if a black worker and a white worker were together caught stealing from their employer and then the white man was promoted while the black man was dismissed. The black man's discrimination claim would not depend on his filing a complaint that his partner in crime should also be fired, but only on the fact that he was not treated equally. *See McDonald*, 427 U.S. at 282-83.

Amherst's ability to discipline Jones did not in any way turn on Doe filing a formal complaint. Amherst's policy explicitly authorized it to prosecute sexual misconduct without the assent of the victim. *See Procedure*, at III, ¶2, p. 20. Indeed, Title IX *requires* it at least to investigate and consider prosecution of sexual misconduct of which it is aware. *See Dear Colleague Letter*[27] at p. 4 ("Regardless of whether a harassed student . . . files a complaint under the school's grievance procedures or otherwise requests action on the student's behalf, ***a school that knows, or reasonably should know, about possible harassment must promptly investigate*** to determine what occurred and then take appropriate steps to resolve the situation" (emphasis added)). *See U-Mass*, 2015 WL 4306521at *7 (A school "is required to respond when it 'knows, or reasonably should know, about possible harassment' of a student, regardless of whether the harassed student actually makes a complaint." ). Amherst was indisputably aware that Doe *had* been assaulted by Jones, yet it simply turned a blind eye.

[27] Available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

**B. Doe's Erroneous Outcome Claim**

Additionally, Doe has adequately pled a Title IX claim by demonstrating facts to support a claim under the erroneous outcome theory. To plead a Title IX claim under the erroneous outcome theory, a plaintiff must allege "particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding." *Yusuf*, 35 F.3d at 715. The "pleading burden in this regard is not heavy." *Id.* In addition, the plaintiff must allege that gender bias had a causal connection to the erroneous finding. *Yusuf,* at 715 (requiring a plaintiff to "allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding").

Doe's Complaint meets the criteria of the erroneous outcome theory. The facts he alleges more than cast "some articulable doubt on the accuracy of the outcome." The question then becomes, whether he has adequately pled that the outcome was causally related to gender bias. This element is satisfied by evidence of disparate treatment of the sexes, *Yusuf*, 35 F.3d at 715, by an outmoded or stereotypical view of gender roles, *Bleiler v. Coll. of Holy Cross*, 2013 WL 4714340, at *5 (D. Mass. Aug. 26, 2013) , or by allegations that the university was under pressure to prosecute a male for sexual abuse. *See Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 751 (S.D. Ohio 2014). Plaintiff has sufficiently alleged each of these. He has shown more than a *prima facie* case of disparate treatment by sex. Doe has shown a lack of concern for *his* consent, an attitude undoubtedly the product of the old canard that men always want to have sex with women. And he has shown that Amherst was under extreme pressure, when considering his case, to show that it could and would take disciplinary action against a *male*. This was beyond a desire to comply with the law. *Compare U-Mass*, 2015 WL 4306521at *9. If legal compliance were the only motive, Amherst would not have totally ignored Jones's assault of plaintiff. Given

the lesser burden of production at this pleading stage, plaintiff is entitled to proceed on this theory as well.

**V. The Tortious Interference Claim (Count III)**

Doe concedes that his current complaint does not adequately allege affirmative conduct on the part of the individual defendants, however, Doe intends to seek leave to file an amendment to remedy this defect.

**VI. The 42 U.S.C. §1981 Claim (Count V)**

To survive dismissal, a §1981 plaintiff must allege (1) membership in a racial minority; (2) impairment of a contractual right; and (3) the impairment was substantially motivated by racial animus. *Goodman v. Bowdoin Coll.*, 380 F.3d 33, 43 (1st Cir. 2004). There is no dispute that Doe is a member of a racial minority. The College claims Doe has not sufficiently alleged impairment of a contractual right, but surely he has where he alleges his expulsion was not proper for the reasons set out above. The College also contends that Doe has not sufficiently pled that his expulsion was substantially motivated by his race.

Doe pleads a violation of § 1981 as a complement or alternative to his Title IX theory. First and foremost, Doe was discriminated against because he is male. Secondarily, Doe was discriminated against because he is a male of color. Doe alleges that amidst an environment rife with allegations that Amherst, specifically, and American universities, generally, were not responding appropriately to female students alleging they had been victims of sexual assault, the College aggressively began to prosecute these cases, targeting "male students of color." Doe further alleges that the only students who have been suspended or expelled have been male students of color. Although these allegations are made on information and belief, they are supported by the Committee on Sexual Misconduct's Report, which stated that Amherst had a

reputation for taking "a more punitive attitude toward non-white perpetrators, especially if the victim is white."[28] *See* Compl. at ¶77. The College's attempt, at pages 44-45 of their memorandum of law, to dismiss this reputational evidence from a College commissioned report, by claiming it was only students of color who believed the College had this reputation, and not white students, does not help its cause. It is not surprising that minority students would have heightened sensitivity to the College's racist attitudes, while white students may not know or be aware of such racism. The Complaint pleads enough to allow Doe to move forward and litigate this claim.

**VII. The MCRA (M.G.L. c. 12, § 11H) Claim (Count VI)**

Defendants attack Doe's MCRA claim, believing Doe must plead that the Defendants engaged in threats, intimidation or coercion and by that conduct, interfered in Doe's exercise of rights protected under the law. This is incorrect.

The Massachusetts Civil Rights Act prohibits interference with "the exercise or enjoyment of rights secured by the Constitution or laws of the United States or rights secured by the Constitution or laws of the Commonwealth by threats, intimidation, or coercion." *Redgrave v. Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 98 (1987). The MCRA provides a remedy where private action is involved. *Id.*; G.L. c. 12, §§11H-11I. "Like all civil rights statutes, §§11H and 11I are entitled to liberal construction." *Redgrave*, 399 Mass. at 99. As such, "cases within the reason, although not within the letter, of a remedial statute are embraced by its provisions." *Id.* There is no requirement that the actor who deprives a plaintiff of his rights must have had the specific intent to do so. *Id.* In *Redgrave*, the plaintiff alleged that the BSO had cancelled her appearance and its contract with her on the basis of protestors who opposed her

[28] Given that disciplinary proceedings are confidential, it is difficult to imagine how any plaintiff could allege more than what Doe alleges here.

political views regarding the Israeli-Palestinian conflict. *Id.* at 95-96. The Massachusetts Supreme Judicial Court was asked to answer a certified question of the First Circuit: Whether a defendant may be held liable under the MCRA for interfering with a plaintiff's rights by threats, intimidation, or coercion, "if the defendant had no personal desire to interfere with the rights of that person but acquiesced to pressure from third parties who did wish to interfere with such rights?" *Id.* at 96. The SJC answered the question in the affirmative, essentially finding that Redgrave could prevail if the BSO cancelled her contract based on pressure from its subscribers and others in the community who wished to silence her expression of her political views. Further, the SJC found that other considerations of the BSO, namely fear of business disruption, economic loss, and the like, would not justify capitulating to third party pressure which would result in interference with another's protected rights. *Id.* at 99-101.

As in *Redgrave*, Doe has alleged a charged and activist environment on campus which was demanding that Amherst discipline a male student for sexually assaulting a female. Doe has alleged that the Defendants capitulated, by fast-tracking his disciplinary process, ignoring evidence, and issuing the harshest sanction against him notwithstanding the requirements of the *Handbook*, in order to reach a preordained conclusion dictated by these third party elements: guilt and expulsion. The end result was a discriminatory proceeding tainted with gender bias, in violation of his rights under Title IX. This adequately states an MCRA claim under *Redgrave*.

**VIII. <u>The Defamation Claim (Count VII).</u>**

Defendants rightly observe that a defamation plaintiff must allege and ultimately prove that defendants acted with the requisite degree of fault. However, from here, defendants' argument proceeds to set out the incorrect legal analysis because, in fact, the campus-wide alert was actionably false. As a result, the degree of fault the defendants claim Doe must allege —

actual (not constitutional) malice or ill will — is inapplicable, and Doe, a private figure, must only allege that the false statement was published negligently.

Defendants' *sole* argument for dismissal of the defamation claim is that the statement is true, and Plaintiff has not alleged sufficient evidence of ill will. But the statement is alleged to be false. A written statement must be construed "in its entirety and weighed in connection with its structure, nuances, implications and connotations." *Clark v. Pearson*, 248 F. Supp. 188, 191 (D.D.C. 1965). Innuendo and insinuation are as actionable as a direct defamatory statement. *See Mabardi v. Boston-Herald-Traveler Corp.*, 347 Mass. 411, 413 (1964) (reversing dismissal where plaintiff's picture was published with others whom the article represented as having committed criminal and fraudulent acts under investigation); *Smith v. Suburban Rests., Inc.*, 374 Mass. 528, 530 (1978) ("inferences which might be drawn by a considerable and respectable segment of the community can make a publication actionable"); *Reilly v. Associated Press*, 59 Mass. App. Ct. 764, 774 (2003) ("Defamation can occur by innuendo as well as by explicit assertion.").

Defendants include the full text of the alert in their memorandum, and Doe encourages the Court to review its full text. Pertinently, the alert stated:

> [A College] hearing board found, by a preponderance of the evidence, that an Amherst College student violated Amherst College's Sexual Misconduct Policy by committing sexual assault. … It is now Amherst College's practice to notify the community when ***a student has been expelled for committing sexual violence.*** …Expulsion means the permanent termination of student and degree-candidate status at Amherst College. Expelled students are not allowed on campus.

Def. Mem. at p. 48 (emphasis added). Importantly, it was *defendants* (*i.e.*, the College) who had made the "finding" through its agents, the Hearing Board members, and it was *defendants* (the individual defendants) who orchestrated the proceeding and finding and were aware of all that precipitated it. The defendants had in their possession facts which suggested this was not true,

including that Doe was incapacitated at the time of the sexual encounter, unable to consent to it in his own right and completely unaware of where he was, who he was with, or what was happening, and that the individual defendants were acting on gender and/or racial bias and not based on the evidence adduced, such as it was. A false statement is one which leaves "a different effect on the mind of the reader from that which the pleaded truth would have produced." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991); *Murphy v. Boston Herald, Inc.*, 449 Mass. 42, 56-57 (2007) ("A statement is false, for purposes of libel, if there has been a 'material change in the meaning conveyed by the statement'" from what the truth would have conveyed (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991).). This surely qualifies. The determination is ordinarily one for the jury, particularly where the issue of defamatory sting, against which falsity is measured, must go to the finder of fact. *Murphy*, 449 Mass. at 56-57 (citations omitted); *Sharratt v. Hous. Innovations, Inc.*, 365 Mass. 141, 143 (1974); *Schiavone Constr. Co. v. Time, Inc.*, 847 F.2d 1069, 1084 (3d Cir. 1988) (defamatory meaning and issues of truth or falsity must go to the jury and noting "the truth must be as broad as the defamatory imputation or 'sting' of the statement" (citation omitted)); *see also Mahalik v. Duprey*, 11 Mass. App. Ct. 602 (1981) (statements of fact although substantially true can become false and defamatory when inadequately explained or if the publication distorts the truth). A campus-alert has been found to be actionable in a similar case. *See Wells*, 7 F. Supp. 3d at 750 (alert stating plaintiff was "found responsible for a serious violation of the Code of Student Conduct" which would have been understood to refer to sexual assault — but did not mention a sanction — found to be actionable where plaintiff alleged deficiencies in the proceedings, including denial of a lawyer and opportunity to present evidence and where the college "may have been over its head with relation to an alleged false accusation of sexual assault").

If ill will or evil motive were needed, and it is not, Doe alleges the defendants capitulated to pressure in order to find him guilty and expel him no matter the evidence and that they acted with gender bias; this suffices at this stage.

Amherst appears to argue, in effect, that its publication is entitled to a sort of fair report privilege because it purports to recount the findings that *it made* against Doe, which would protect it from defamation for even false statements. Such a privilege is inapplicable. *First*, the fair report privilege is available to the media only, not to private parties. *Howell v. Enter. Pub. Co., LLC*, 455 Mass. 641, 651 (2010). *Second*, the privilege applies to even false reports but only so long as they fairly and accurately report the underlying proceedings and were not published with malice. *Id.* The fair report privilege is a defense, and as such, it is defendants' burden to prove and is typically not susceptible to even summary judgment unless the facts are undisputed and the language of the publication is not ambiguous. *Freedom Comm'ns, Inc. d/b/a The Brownsville Herald & The Valley Morning Star v. Coronado*, 296 S.W.3d 790, 798 (Tex. App. Ct. 2009). If a report is accurate but omits information necessary to convey the same impression the precise truth would have given, then it is not fair. *Oort v. DaSilva*, 2004 WL 2070977, at *5 (Mass. Super. Ct. Sept. 15, 2004). The privilege does not apply to a private university, but even if it did, Doe alleges that at the time of publication, defendants were aware that Doe had blacked out, was incapacitated, and lacked conscious awareness, that the Hearing Board had *not* found that he acted to physically force Jones to engage in any sexual activity against her will, and as such, that reporting that Doe had committed sexual violence, and that the College had rightly so found in its own proceeding over which it presided and its agents

adjudicated, was not a fair characterization of the underlying proceedings.[29] The defamation claim is adequately pled.

## IX. The Emotional Distress Claims (Counts VIII and IX)

Doe presses only his negligent infliction of emotional distress claim and stands ready to agree to dismissal of his intentional infliction of emotional distress claim. As for the negligent infliction claim, Defendants contend, first, that Plaintiff has not pled negligence, but in fact, he has pled facts which demonstrate that the individual defendants were negligent.[30] Plaintiff alleges the individual defendants, who had an obligation as part of their jobs to ensure that Plaintiff received a disciplinary process that was basically fair and met the College's own guidelines, and who had an obligation not to ignore but to consider relevant, exculpatory evidence when brought to their attention within a reasonable time, failed to meet those obligations. This negligence resulted in Doe's unjustifiable expulsion and continued alienation from Amherst and resulting emotional distress.

With respect to physical harm, Doe has alleged that his severe emotional distress from being accused and then branded a sexual assailant had physical manifestations. Counsel represents that Doe will testify that he suffered sleeplessness, depression, anxiety, fatigue, listlessness and inability to focus. *See Kelly v. Brigham & Women's Hosp.*, 51 Mass. App. Ct. 297, 306 (2001) (depression, cramps, shortness of breath, nightmares sufficient to support negligent infliction claim); *Bresnaham v. McAuliffe*, 47 Mass. App. Ct. 278, 282 (1999) (uncontrollable crying, stomach pain, headaches, loss of concentration, depression, anger,

[29] Because defendants claim the publication is true, they do not address whether Doe has alleged the publication was made negligently, but surely, given the defendants' alleged awareness of the foregoing facts which demonstrates a departure from the standard of care.

[30] To the extent necessary, Plaintiff seeks leave to amend his complaint to formally assert claims of negligence against the individual defendants in the performance of their work for the College which caused foreseeable harm to Doe.

anxiety, loss of sexual relationship and nightmares sufficient to support claim). To the extent necessary, Doe stands ready to amend his complaint to specify these physical symptoms of his emotional distress.

## CONCLUSION

For all the reasons stated herein, Plaintiff respectfully requests that the Court deny Defendants' motion in its entirety.

Respectfully submitted,
JOHN DOE,
By his attorneys,

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Dated: November 18, 2015

## CERTIFICATE OF SERVICE

I, Megan C. Deluhery, hereby certify that this document has been filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on this date.

Date: November 18, 2015

/s/ Megan C. Deluhery
Megan C. Deluhery